INDEX

CITATIONS

Page

Cases:

Erwin Layne v. *United States*, No. 74-5675, certiorari denied, March 17, 1975 2
Kotteakos v. *United States*, 328 U.S. 750 5
Ortiz v. *United States*, 358 F.2d 107, certiorari denied, 385 U.S. 861 7
Sorrells v. *United States*, 287 U.S. 435 7

Constitution, statutes and regulations:

United States Constitution, Sixth Amendment 8
15 U.S.C. 77q 2
15 U.S.C. 77x 2
15 U.S.C. 78ff 2
15 U.S.C. 78j(b) 2
15 U.S.C. 78o(c)(2) 2
18 U.S.C. 2 2
18 U.S.C. 371 2
18 U.S.C. 1001 2
18 U.S.C. 1341 2
17 C.F.R. 240-10b5 2
17 C.F.R. 240.15c2-4 2

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-865

THEODORE KOSS AND KOSS SECURITIES CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that they were improperly prejudiced because evidence of a conspiracy other than the conspiracy charged in the indictment was introduced at trial, (2) that the indictment should have been dismissed because they were entrapped "as a matter of law," (3) that insufficient evidence was introduced to sustain the charge that they had failed to deposit in escrow the requisite amount of money from a contingent public offering of securities, and (4) that they were denied sufficient pretrial disclosure. In addition to these joint contentions, petitioner Koss argues (5) that the evidence was insufficient to sustain the charge that he had willfully submitted false documents to the Securities and Exchange Commission.

Petitioners were indicted with fourteen others for conspiring to commit stock fraud and for several other offenses related to the sale of stock in Automated Information Systems, Inc. ("Automated").[1] Following a jury trial in the United States District Court for the Southern District of New York, petitioners were found guilty. Petitioner Theodore Koss was sentenced to a one-year term of imprisonment on Count 1, with imposition of sentence on Counts 2, 3, 4, 5, 8, 11 and 13 suspended, and was placed on probation for three years. Petitioner Koss Securities was fined $1,500 on Count 1, with imposition of sentence suspended on Counts 2, 3, 4, 5, 8 and 11. The court of appeals affirmed (Pet. App. 3a-23a).[2]

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[1]Petitioners were both named in Counts 1 through 11 of the indictment, which charged conspiracy to violate the securities laws and to commit mail fraud, in violation of 18 U.S.C. 371 (Count 1); fraud in the offer and sale of securities, in violation of 15 U.S.C. 77q and 77x, and 18 U.S.C. 2 (Count 2); fraud in connection with the purchase and sale of securities, in violation of 15 U.S.C. 78j(b) and 78ff, 18 U.S.C. 2, and 17 C.F.R. 240.10b5 (Count 3); failure to deposit the proceeds of an underwriting promptly into an escrow account, in violation of 15 U.S.C. 78o(c)(2) and 78ff, 18 U.S.C. 2, and 17 C.F.R. 240.15c2-4 (Count 4); and mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts 5 through 11). In addition, petitioner Theodore Koss was charged alone with having made false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001 (Count 12), and with having submitted false documents to the Commission, also in violation of 18 U.S.C. 1001 (Count 13). The indictment also named seven persons as unindicted co-conspirators. Counts 6, 7, 9 and 10, each involving mail fraud, were dismissed by the court, with the government's consent, on defense motion. Count 12, which charged only petitioner Theordore Koss, was severed prior to trial.

[2]One of petitioners' co-defendants, Erwin Layne, has previously petitioned this Court for review of his conviction. *Erwin Layne* v. *United States*, No. 74-5675, certiorari denied, March 17, 1975. Layne's petition involved issues different from those presented in the present petition.

The relevant facts are fully set forth in the opinion of the court of appeals (Pet. App. 6a-12a). Briefly, in September 1970, Robert Santis, the founder and president of Automated Information Systems, Inc., met with petitioner Theodore Koss, the president and major stockholder of Koss Securities, to discuss the underwriting by Koss of a public offering of stock in Automated. Petitioners agreed to underwrite the offering of 65,000 shares of Automated common stock at one dollar per share. Koss was to receive a 10 percent commission on the proceeds of the sale and an additional 5 percent of the sale price for the expenses of underwriting the issue. The offering was to be on a "best efforts, all or none" basis, which meant that if all 65,000 shares were not sold within a specified period, Koss would not receive his commission (Tr. 93-95a, 1146-1149, 1191, 1548).

Within 45 days of the effective date of the public offering, it had become apparent that petitioners would not be able to sell all 65,000 of the Automated shares. After a second underwriter that petitioners had enlisted to assist with the offering had also failed to sell a significant amount of the stock, Murray Levine—an employee of Koss Securities—met with Michael Hellerman and Murray Taylor to seek additional assistance. Hellerman and Taylor agreed "to sell the remaining 45,600 shares on two conditions: that they receive one-half of the proceeds of the offering, and that they be given complete control over all 65,000 shares so that the market could be manipulated" (Pet. App. 7a-8a). Levine assured Hellerman and Taylor that Koss would not sell any Automated stock unless directed to do so by Hellerman, and Hellerman agreed to purchase the approximately 15,000 shares that had been sold by petitioners at one dollar per share for one dollar and fifty cents per share (Tr. 127-132, 243, 257, 890-891).

Hellerman and Taylor then began to "sell" the remaining 45,600 shares. This was accomplished by a variety of means, including transferring several thousand shares to unknown persons selected at random from the Manhattan and Brooklyn telephone directories (Tr. 132-136). As the court of appeals stated, petitioner Koss knew, prior to the time the offering was completed and before any shares had been issued, both that the Hellerman group planned to manipulate the post-offering market in the stock and that Automated would receive substantially less new capital from the offering than stated in the offering circular (Pet. App. 9a).

Despite this knowledge, and "in spite of [petitioner Koss'] affirmative duties as an underwriter to the investing public" (*ibid.*), petitioners did nothing to have the offering circular amended. Instead, with full knowledge concerning the scheme devised by Hellerman, petitioner Koss "jockeyed" in an effort to gain a share of the profits anticipated from the manipulation (*ibid.*). Among other things, Koss forced Hellerman into an agreement whereby Koss was permitted to retain control of 5,000 shares of Automated stock and to sell that stock later at inflated prices in proportion to sales made by Hellerman (*id.* at 10a). As the price of the Automated stock was artificially pushed upward during the ensuing months, Koss repeatedly complained to Hellerman that he was not being allowed to sell his shares fast enough (*id.* at 10a-11a).

At the same time, petitioners Koss and Koss Securities also performed a number of services essential to successful manipulation of the after-market for the Automated stock. These included facilitating the cashing of checks with forged endorsements at petitioners' bank, a service for which petitioners were paid one percent of the face value of the checks that were cashed (Tr. 185, 279, 421,

428, 439-440, 443, 445-448, 1073), and guaranteeing the signatures on many of the certificates (Pet. App. 11a). At its high point, Automated stock sold for over five dollars per share; within one week of the collapse of the conspiracy involving petitioners, the price of the stock fell to twenty-five cents per share (*id.* at 11a, 12a).

1. Petitioners assert (Pet. 13-20) that the evidence at trial showed that they participated in a conspiracy different from that alleged in the indictment and that, under *Kotteakos* v. *United States,* 328 U.S. 750, their convictions must therefore be reversed.

The evidence adduced at trial revealed that in return for Hellerman's successful completion of the offering of Automated stock—as a result of which petitioners received the underwriter's commission to which they otherwise would not have been entitled—petitioner Koss violated his duty as an underwriter by not disclosing material information through an amended offering circular. Koss also acted affirmatively in helping Hellerman gain control over the outstanding Automated stock so that Hellerman could manipulate the price of the stock in the after-market.

With full knowledge of Hellerman's plans, moreover, Koss jockeyed to secure a greater share of the profits than he had originally been promised. Initially, Koss agreed to give Hellerman control in the after-market for Automated stock by arranging for the sale to Hellerman, for one dollar and fifty cents per share, of the 15,000 shares previously sold by Koss to his customers for one dollar. Thereafter, Koss attempted to change the bargain to his own advantage by inducing Hellerman to allow him to retain and sell for his profit the 5,000 shares he had bought for his firm at the same time

he was recommending to his customers that they sell their stock to Hellerman. In short, not only did Koss agree, as part of the scheme to complete the Automated offering successfully, to let Hellerman rig subsequent sales of Automated stock in the after-market, he insisted thereafter that he also be permitted to share in the profits from that manipulation.

In any event, the trial judge charged the jury on the issue of multiple conspiracies (Tr. 2176-2181), and no objection was made to the adequacy of that charge. On the evidence introduced at trial, we submit that the jury's finding that petitioners were guilty of the conspiracy charged in the indictment was proper.[3]

2. Petitioners also contend (Pet. 21-23) that the indictment should have been dismissed because they were entrapped "as a matter of law."

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[3]Petitioners also argue (Pet. 20-21) that the court failed to give the necessary cautionary instruction differentiating evidence concerning their activities from other evidence in the case. This contention is without merit. The court instructed the jury, for example, as follows (Tr. 2180-2181):

> You will recall that on several occasions you were specifically told that certain evidence was admitted solely with respect to the defendant Koss, Koss Securities Corporation or Hagler.
>
> You are instructed to consider such testimony only with respect to these defendants and you must not consider such testimony in the slightest degree in your discussions and deliberations with relation to any other defendant.
>
> If after considering each defendant separately you find that he was not a member of the conspiracy alleged in the indictment, or is a member of some other conspiracy than the one alleged in the indictment, then you should acquit that particular defendant on Count 1.
>
> Thus it is possible for you to find that none of the defendants, or some of the defendants, or all of the defendants on trial were members of the single conspiracy alleged in the indictment.

This argument rests on the fact that, prior to the beginning of the present conspiracy, both Hellerman and Taylor had agreed to furnish information to the government in unrelated cases. The evidence was undisputed, however, that both were wholehearted criminal participants in the Automated scheme and that the government had no prior knowledge of their efforts to rig the after-market in Automated stock. Hellerman informed the government of the existence of the Automated conspiracy only after its collapse had become imminent (Pet. App. 18a).

The logic of petitioners' argument on the issue of entrapment would immunize conspirators from prosecution for their illegal activities whenever one or more of their co-conspirators had in the past, for whatever reason, provided information to the government. None of the policies underlying judicial recognition of the entrapment defense justifies such a result. It is settled that the issue of entrapment is raised only "when the criminal design originates with the officials [or agents] of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that [the government] may prosecute." *Sorrells* v. *United States*, 287 U.S. 435, 442; see also *Ortiz* v. *United States*, 358 F. 2d 107, 108 (C.A. 9), certiorari denied, 385 U.S. 861.

As noted by the court of appeals (Pet. App. 19a, n.7), there was abundant evidence in the present case of petitioners' willing participation in the conspiracy charged in the indictment. Even if Hellerman and Taylor had been participating in the scheme at the behest of the government, moreover, the claim of entrapment would still fail in light of the "overwhelming" evidence of petitioner Koss' predisposition to engage in the conspiracy (*ibid.*).

3. Petitioners argue further (Pet. 24-25) that there was insufficient evidence to sustain the charge that they had failed to deposit in escrow the requisite amount of money from their offering of Automated stock.

Petitioners do not dispute the fact that they sold approximately 15,000 shares of Automated stock during December 1970, at one dollar per share, or that an escrow account was not opened until December 30, 1970 (into which only $3,000, not directly derived from customer payments for Automated shares, was deposited). The evidence at trial showed, moreover, that petitioners received two additional payments for Automated stock in January 1971 and a further payment in February 1971, but no additional escrow deposits were made until March 5, 1971, after the offering had been [illegible] (Pet. App. 13a-14a). We submit that the court of appeals was correct in suggesting that the jury could justifiably have concluded [illegible] the basis of all of the evidence, "that one [illegible] Koss delayed paying [Automated] the proceeds from the 15,000 shares was that the money had been commingled with the firm's own funds and used in its business" (Pet. App. 14a).

4. Petitioners also contend (Pet. 26-27) that they were denied their Sixth Amendment right to be informed of the charges against them.

This contention was properly rejected by the court of appeals, in an analysis upon which we rely (Pet. App. 20a):

> We find * * * that [Koss] has failed to demonstrate that the indictment was insufficient, or that the trial judge abused his broad discretion in denying portions of his bill of particulars. [Citation omitted.] Koss complains that he was prejudiced as

> a result of the trial court's order because he did not know before trial that the following would be proved against him: the guaranteeing of forged signatures on stock certificates, knowledge of the kickback from Santis to Hellerman, cashing a forged check for Hellerman, and selling 10,000 shares to Hellerman at around $1.50 per share. However, we find no abuse of discretion, since Koss was informed, among other things, that he was charged with having joined, in January or February of 1971, a conspiracy of named persons to commit fraud in the offer and sale of [Automated] securities and to manipulate the post-offering market; that pursuant to this conspiracy Hellerman and Santis worked out a fifty-percent kickback arrangement in the offering; that Koss Securities' transactions in [Automated] as both principal and agent in the first half of 1971 were part of that manipulation; that he bought stock from his customers below market price; and that numerous checks and stock powers were forged by certain named conspirators and other in the process of carrying out the conspiracy.

5. Finally, petitioner Koss contends (Pet. 25-26) that the evidence was insufficient to sustain the charge that he had willfully given false information to the Securities and Exchange Commission. In discussing this issue, the court of appeals noted (Pet. App. 14a-15a):

> The "blue questionnaire" submitted by Koss, which he said represented all the trades of the firm and its customers in [Automated], indicated sales to Zardus' firm of only 4,400 shares between April 7 and April 14, 1971, when the evidence at trial was that 5,000 shares had been sold by Koss and Koss customers to that firm. Furthermore, Koss

> submitted a document which he said contained all the trades in [Automated] which Koss Securities had made for its own account. Yet Mrs. Koss testified that that document was merely her husband's position sheet and would "mean nothing," to someone looking for all the [Automated] trades made by the house. The government also showed numerous inconsistencies among Koss' records, especially between those he submitted in June 1971 and those the SEC obtained from the firm in November that year, with regard to trades of [Automated] shares.

There was thus ample evidence at trial from which the jury could have concluded that petitioner Koss had willfully submitted false documents to the Securities and Exchange Commission. Koss had an obvious motive in falsifying his records to cover his own and his firm's dealings in the after-market for Automated stock. It is no defense to that charge that he did so ineptly.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.